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No. 786

In the Supreme Court of the United States

OCTOBER TERM, 1963

EDWARD A. FITZGERALD, JR., and J. L. WITT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 324 F. 2d 153.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1963. A petition for rehearing was denied on December 27, 1963. The petition for a writ of certiorari was filed on January 24, 1964. The jur-

isdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' acquittal of conspiracy and a number of substantive offenses required reversal of their convictions of the one substantive offense on which they were convicted.

STATUTE INVOLVED

26 U.S.C. 5686(a) provides as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT

Petitioners were charged, in the United States District Court for the Southern District of Georgia, in six counts with substantive violations of federal liquor laws and in a seventh count for conspiracy, alleging the substantive offenses as overt acts (R. 1-5).[1] A

[1] Count 1 charged possession of a copper still and cap on October 17, 1961, intended for use in violation of federal liquor laws.

Count 2 charged possession of 4½ gallons of non-taxpaid whiskey, on December 14, 1961.

Count 3 charged possession of five copper-coil-type condensers, on December 14, 1961.

jury acquitted them on all counts except the fourth, which charged that on November 17, 1961, they knowingly possessed a "Gatling gun" type condenser designed and intended for use in violation of the internal revenue liquor laws. Both petitioners were sentenced to imprisonment for one year (R. 578-582). The court of appeals affirmed.

In October 1961, the Alcohol and Tobacco Division of the Internal Revenue Service was investigating the activities of petitioners, who were liquor enforcement officers of the State of Georgia. To assist in this investigation, the federal agents employed one Joe Phillips, who had previously engaged in bootlegging (R. 17, 67-68). On the evening of November 8, Phillips drove his car, with an investigator for the division concealed in its trunk, to the home of petitioner Fitzgerald, who had previously communicated with Phillips (R. 17, 116). The investigator, who knew Fitzgerald's voice, testified to the conversation between Fitzgerald and Phillips. Fitzgerald described a shotgun or "Gatling gun" type condenser that he either had or was expecting to acquire, which would expedite the manufacture of whiskey. He said he would speak to petitioner Witt about it and if Phillips bought it, the cost would be

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Count 4 charged possession of a Gatling gun type copper condenser, on November 17, 1961.

Count 5 charged possession of a gasoline pressure tank and a quantity of high pressure hose, on November 28, 1961.

Count 6 charged possession of three L.P. gas cylinders, on January 12, 1962.

Count 7 charged conspiracy to violate federal liquor laws, from approximately April 1, 1961, to February 13, 1962.

one hundred dollars (R. 111, 116-117). The following night, under similar circumstances, the investigator heard a further conversation in which Fitzgerald told Phillips that Witt had acquired by a raid a condenser of the type discussed and had it at his home. Fitzgerald further discussed its advantages and again said that the cost would be one hundred dollars (R. 118-119). Phillips also testified about these events (R. 25-34).

On November 17, the investigator, who was posing as an assistant to Phillips, witnessed the delivery of the condenser by Witt to Phillips and the payment by Phillips to Witt of one hundred dollars which the investigator had procured from official funds. The investigator testified that Witt quoted Fitzgerald as telling him that Phillips wanted the condenser and that the agreed price was one hundred dollars. Objection that the statement was made out of the presence of Fitzgerald was overruled on the ground that it was a statement made in furtherance of the conspiracy (R. 120-121).

Two days later, the investigator was again concealed in the car trunk and heard Phillips and Fitzgerald discuss the previous delivery of the condenser and the amount paid for it (R. 122).

ARGUMENT

1. The jury acquitted petitioners, not only of the conspiracy count, but of all the substantive offenses occurring on dates between October 17, 1961 and January 12, 1962, except for that charging possession

of the Gatling condenser on November 17, 1961. There is thus no necessary inconsistency in the verdict.[2] In any event, acquittal of a conspiracy charge does not require reversal of a conviction for a substantive offense within the alleged conspiracy, even if there is an inconsistency in such a verdict. *Thomas* v. *United States*, 227 F. 2d 667, 671 (C.A. 9), certiorari denied, 350 U.S. 911; *United States* v. *Denny*, 165 F. 2d 668, 670 (C.A. 7), certiorari denied, 333 U.S. 844.

Petitioners suggest, but do not argue, a contention that they could not be guilty of the offense charged because they were enforcement officers. Their official status is irrelevant. If they sold materials or equipment which they intended to be used in the illicit distillation of spirits, they violated the statute. *Chapman* v. *United States*, 271 F. 2d 593 (C.A. 5), certiorari denied, 362 U.S. 928.

2. The statement of petitioner Witt when he delivered the condenser that he was acting on instructions from petitioner Fitzgerald was properly admitted. The rule that statements of one conspirator in furtherance of a conspiracy are admissible against others applies to those who are joint venturers in

[2] At the outset, the jurors were apparently under the impression that a verdict of guilty on the conspiracy count required a finding that each petitioner committed every overt act charged in the six substantive counts (R. 568-573). Despite a contrary instruction from the trial court (R. 576-577), that impression may have persisted, or the jury may have thought the evidence did not sustain the overall conspiracy charged, alleged to have continued almost a year (R. 4).

crime, whether or not there is a formal charge of conspiracy. *United States* v. *Sapperstein*, 312 F. 2d 694, 698 (C.A. 4) and cases cited. Here the jury's verdict against Fitzgerald on the substantive count necessarily included a finding that he was Witt's principal or joint venturer on November 17, when Witt delivered the condenser. Thus, despite the acquittal on the conspiracy charge, it is clear the statement in controversy was within the rule. There was, moreover, ample evidence that petitioner Fitzgerald had control of the condenser and was able to cause its production.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1964

U. S. GOVERNMENT PRINTING OFFICE 1964 O—721340